No. 452

In the Supreme Court of the United States

October Term, 1944

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

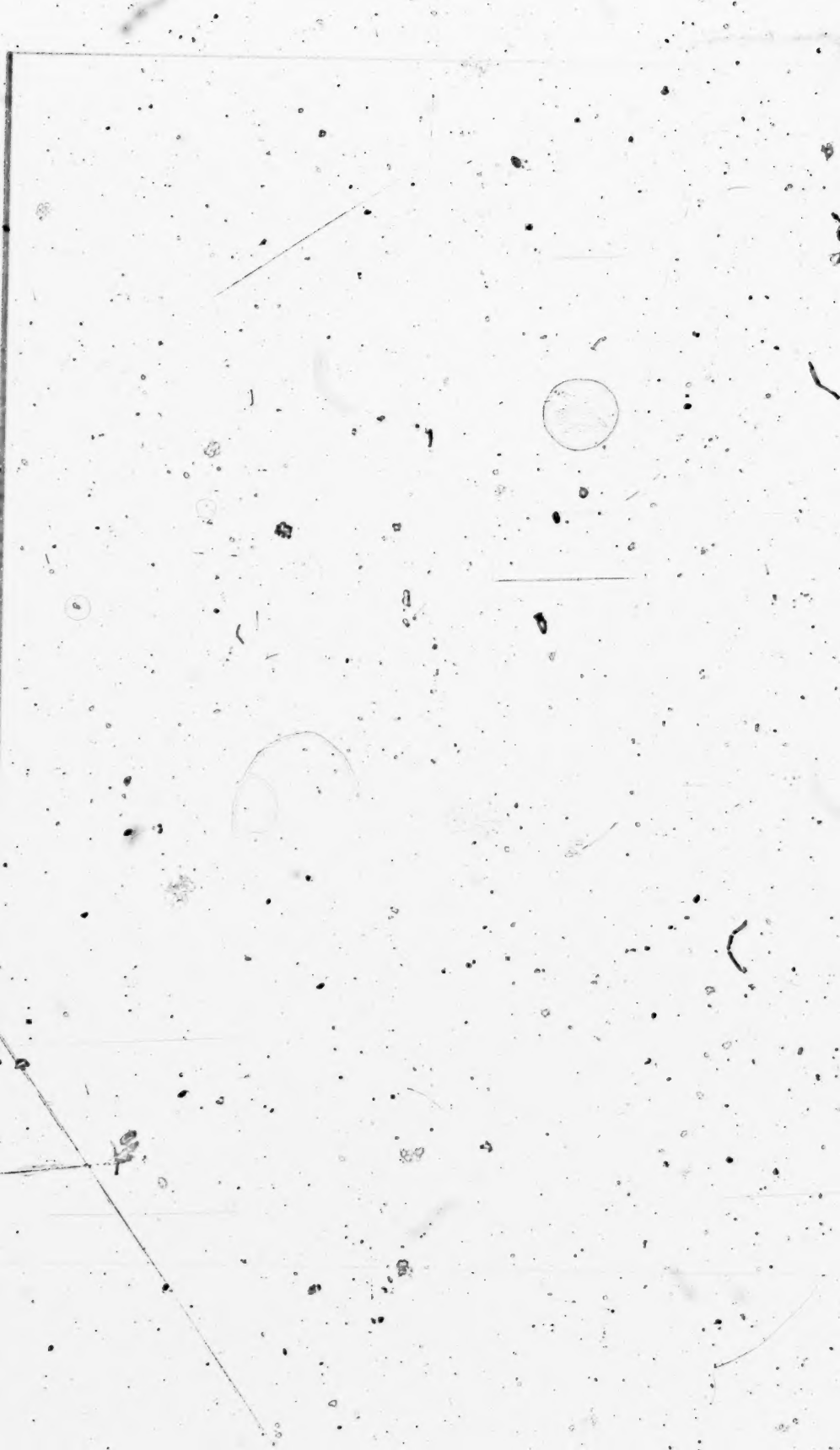
LeTOURNEAU COMPANY OF GEORGIA.

On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR LeTOURNEAU COMPANY OF GEORGIA

INDEX

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statute Involved	2
Statement	3
Summary of Argument	17
Law Applicable	18
The Rule Was Not Invalid	20
Employer has right to suspend employee with or without cause so long as this is not done for Union Activities	22
Board has Burden of Proving Violation of Act	23
Appendix	27



CITATIONS OF AUTHORITY

Cases:

	Page
Boeing Airplane Co. v. National Labor Relations Board, 140 Fed. (2d) 423 (C. C. A. 10)	21
Carter Carburetor Co. v. National Labor Relations Board, 140 Fed. (2d) 714	20
Electric Stop Nut Corp. v. National Labor Relations Board, 142 Fed. (2d) 371 (19)	19
Interlake Iron Corp. v. National Labor Relations Board, 131 Fed. (2d) 129, 132 (8) (C. C. A. 7)	25
International Brotherhood of Electrical Workers v. National Labor Relations Board, 305 U. S. 197; 83 L. ed. 126	25
Midland Steel Products Co. v. National Labor Relations Board, 113 Fed. (2d) 800	21
National Labor Relations Board v. Bluebell Globe Co., 120 Fed. (2d) 974	23
National Labor Relations Board v. Denver Tent & Awning Co., 138 Fed. (2d) 410 (C. C. A. 10)	21
National Labor Relations Board v. El Paso Electric Co., 133 Fed. (2d) 168 (C. C. A. 5)	21
National Labor Relations Board v. Faultless Caster Corp., 135 Fed. (2d) 559 (3)	19-20
National Labor Relations Board v. Jones & Laughlin S. Corp., 301 U. S. 1; 81 L. ed. 893 (18)	23-24
National Labor Relations Board v. Tex-O-Kan. Flour Mills, 122 Fed. (2d) 433 (15)	22
National Labor Relations Board v. Union Mfg. Co., 124 Fed. (2d) 332 (3) (C. C. A. 5)	22-24
National Labor Relations Board v. Williamson Dickie Mfg. Co., 130 Fed. (2d) 260 (C. C. A. 5)	21
Stonewall Cotton Mills v. National Labor Relations Board, 129 Fed. (2d) 629-632	23

Statutes:

National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C., Sec. 151 et seq:	2, 22
Sec. 1	27
Sec. 7	18, 27
Sec. 8 (1)	28
Sec. 8 (2)	20, 28
Sec. 8 (3)	23, 24, 28
Sec. 10 (c)	28
Sec. 10 (e)	2, 28
Sec. 10 (f)	2

No. 452

In the Supreme Court of the United States

October Term, 1944

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LeTOURNEAU COMPANY OF GEORGIA.

On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR LeTOURNEAU COMPANY OF GEORGIA

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 91-93) is reported in 143 Fed. (2d) 67. The findings of fact, conclusions of law and order of the Board (R. 33-46) are reported in 54 N. L. R. B., 1253.

JURISDICTION

The decision of the Circuit Court of Appeals was rendered June 23, 1944. (R. 94). The jurisdiction of

this Court has been invoked under § 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and §§ 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

We do not think the statement under the above heading, page 2 brief for the National Labor Relations Board is a fair statement of the question presented in this record.

A more accurate statement of the question for decision would be:

Does employer's rule prohibiting distribution or posting of handbills, posters, or literature on employer's property without permission of personnel department, when impartially enforced long before union activities began, and applied to prohibiting distribution of all literature, including union literature, only in plant and on two adjacent parking lots outside of plant enclosure and not eleswhere, where lots are graded and surfaced, guarded and serviced by employer, the same as area in plant enclosure, violate National Labor Relations Act, when not designed to impede organization and not discriminatorily applied?

STATUTE INVOLVED

The pertinent provisions of National Labor Relations Act, U. S. C. A. Title 29, § 151, et seq. are set out in the appendix of this brief.

STATEMENT

Because the statement under the above heading page 2 brief for National Labor Relations Board omits material portions of the record necessary to a proper decision of this case, it is deemed necessary to state:

Upon a charge of United Steelworkers of America CIO, the National Labor Relationns Board filed its complaint against LeTourneau Company of Georgia charging it with having engaged in unfair labor practices.

> In substance the Board charged; that on or about April 8, 1943, respondent suspended Grady Ferguson for two days and on or about July 16, 1943, it suspended L. Wayman Ayers for two days because said Ferguson and Ayers had been distributing literature published by the Union outside the plant premises and because they had joined and assisted the Union and engaged in concerted activities with other employees for their mutual aid and protection.
>
> That on or about August 11, 1943, respondent prohibited the bringing of union literature into its plant although it permitted other literature to be brought in.
>
> It was charged that these acts were a discrimination in regard to the hire or tenure or terms or conditions of employment of Fer-

guson and Ayers and discouraged membership in the Union and amounted to an unfair labor practice within the meaning of § 8, subdivision (3) of the Act.

That by the acts referred to respondent interferred with, restrained and coerced, and was restraining and coercing its employees in the exercise of rights guaranteed in § 7 of the Act, and was thereby engaging in an unfair labor practice within the meaning of § 8, subdivision (1) of the Act.

That these acts constituted unfair labor practices within the meaning of § 8, subdivisions (1) and (3) and § 2, subdivisions (6) and (7) of the Act. (R. 8-9-10-11).

Respondent filed its answer, conceded that it was subject to National Labor Relations Act; but denied doing anything amounting to a violation thereof and set up that these men were suspended for violating a rule against distributing literature on two parking lots. (R. 14-15).

The evidence of Ferguson showed that he knew he was not supposed to distribute literature at that place. (T. R. Vol. 2; 82).

The evidence of Ayers showed that he had gone to the Superintendent requesting permission to distribute the literature by posting on bulletin boards of the plant and placing it on the parking lots.

Permission was declined, and on some question arising with respect to the extent of the Company's property on the outside, he was referred to the Captain of the Guards as to the extent of the property, but without seeking this information he proceeded, in direct violation of the rule, to distribute literature. (T. R. 2 Vol. 42-43).

Respondent was engaged in the manufacture of shells, essential war materials for use by the Government and employed twenty-one hundred people. The safety of its employees as well as efficient operation required strict supervision over its plant and two parking lots which it had graded and surfaced for the parking of automobiles of its employees. After the grading and surfacing of the two parking lots experience showed that three or four days a week, sometime oftener, merchants would send fourteen or fifteen year old boys to put out handbills, advertising their wares. They would throw papers in the cars, if open, if not they would hang four or five on the handles, put them under windshield wipers and on the outside of the cars and these would blow all over the lots. (See evidence taken before Trial Examiner, page 138).

One of the parking lots was between the plant and U. S. Highway No. 13, about 150 feet in length, 75 to 100 feet in width and paved with cement or concrete paving, it was separated from the highway by a string of railroad rails upon posts well anchored in the ground in order to force cars to go in at one end and park in an orderly manner. The other parking

lot was just across Highway No. 13 from the plant and was enclosed by a heavy wire, strung on iron posts, well anchored in the ground and it was surfaced with old brick and a layer of sand after having been drained so as to make it an all-weather parking space and so arranged as to require automobiles to enter at one entrance to promote orderly parking. These two lots were for the use of employees in parking some 300 automobiles. (See evidence before Trial Examiner, page 102).

After they were constructed and the employees began to use them for parking their automobiles, there was pilfering and stealing of articles out of the automobiles. To use the language of the Captain of the Guards, these thefts included "everything from a camera to cigaretts, lunches, spare tires, tools, jacks," etc., even one of the automobiles was stolen. (Evidence before Trial Examiner, page 137).

As a result of the excessive advertising material accumulating on the lots, the thefts from employees automobile, and because the Company was engaged in the manufacture of essential war materials, strict supervision over these two parking lots as well as the plant proper was essential.

As far back as July 3, 1941, long before Union activity occurred at respondent's plant, and without any thought of in any way affecting a labor union, or the freedom of its employees, respondent promulgated a rule prohibiting distribution of literature of any

kind in the plant and on the plant premises without permission from the personnel department.

This rule was posted on the bulletin boards July 3, 1941, and there was no effort to organize respondent employees by the CIO until in February, 1943, (R. 38).

On April 1, 1943, after the CIO came on the scene attempting to organize respondent's employees and an election was arranged for April 8, 1943, to determine whether the employees wanted to be represented by the Union, respondent posted a notice in its plant dated April 1, 1943, addressed to all employees to the effect:

> "This company desires to inform each of its employees of a definite fixed policy which it does and will adhere to.
>
> Any statement or rumors by any persons contrary to the policy stated herein are without authority and are hereby repudiated.
>
> The employees of this company have the right to organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and this company will not interfere with, restrain, or coerce any employee in his or her exercise of these rights.
>
> The company will not undertake or permit any interference, aid or restraint of its

employees in the exercise of their right of self-organization and concerted activities for the purpose of collective bargaining or other mutual aid and protection mentioned above.

This company does not neither will it discriminate in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization.

This company seeks at all times to be ready and willing to co-operate with our employees, or their representatives, for the mutual benefit of our company, our employees, and our country.

LeTOURNEAU COMPANY OF GEORGIA
JACK SALVADOR
Vice Pres.-General Mgr."

(R. 43-44).

In the election the Union lost, but it continued its effort to organize respondent's employees. (R. 38).

The evidence showed without conflict that the rule against distribution of literature was not designed to prevent the organization of the employees, and that it was not discriminatorily applied.

At the conclusion of the evidence counsel for respondent moved to strike the allegations in the complaint to the effect that the Company had prohibited the bringing of Union literature into its plant, though

it permitted other literature to be brought in, because there was no evidence to support this allegation. This motion was granted without objection upon the part of either the Union or counsel for the Board. (R. 49).

Counsel for respondent also moved to dismiss the entire complaint. (T. R. Vol. 2, page 203).

The Trial Examiner reserved a ruling on the motion at the time, but subsequently granted the same and recommended to the Board that the complaint be dismissed. (R. 28-29-35).

After reviewing the intermediate report the Board reversed the descision of the Trial Examiner and although it found that respondent had not discriminatorily applied its no-posting-no-distribution of literature as against Ferguson and Ayers, as charged, nevertheless, because it was held that the rule itself, when enforced on two parking lots amounted to a violation of National Labor Relations Act and the Board thereupon issued a desist order, which LeTourneau Company of Georgia contended was entirely without support in the evidence, much broader than the charges made would permit.

The Company filed its petition with United States Circuit Court of Appeals, Fifth Circuit, to review and vacate the Board's order, contending that the rule in question was both legal and necessary because:

(a) It employed more than two thousand people many of whom came to their work in privately owner motor vehicles;

(b) It graded and surfaced - - - - two parking lots for the use of these employees, where they daily parked between two and three hundred automobiles in which was left lunches and other personal property of said employees for the protection of which it became necessary to employ guards in order to prevent pilfering and stealing of the personal belongings of the employees and to keep the lots free from litter;

(c) The rule was enforced from July 3, 1941, and there was no effort to organize a Union at petioner's plant until February, 1943;

(d) There was an election held under the direction of National Labor Relations Board on the question of whether the Union would be adopted, the result of which was more than two to one against the Union;

(e) If petitioner was forced to allow distribution of Union literature in its plant and on its two parking lots, then it could not rightly deny to other members of the public and its other employees the right to distribute other literature, including that advocating a no-union, and this would create discord and deny its employees the protection afforded by the guards;

(f) Such an order as entered by the Board would deprive petitioner of its property without due process of law, contrary to the Fifth Amendment to the Constitution of the United States and if § 2 (6) and (7) of he National Labor Relations Act - - - be

so constructed as to empower the National Labor Relations Board the right to order petitioner to permit the distribution of literature of any kind in its plant and on said two parking lots, then the Act is contrary to the Constitution, and null and void. (R. 3-4).

The Board filed its answer to that petition and after a general denial of the attacks upon the validity of its order, it asserted the validity of the order and asked the Court to enforce the same. The Circuit Court of Appeals sustained the petition of LeTourneau Company of Georgia and vacated and set aside the order of the Board, and it is this judgment that petitioner for certiorari seeks to have set aside.

LeTourneau Company of Georgia now contends that the judgment or order of National Labor Relations Board was illegal, null and void for all of the same reasons set forth in its petition to review the same and particularly as specified in paragraph 7. (R. 3).

The proof showed without conflict, and the Board found as a fact that on July 3, 1941, the respondent had promulgated a rule which provided in part " - - - no merchant, concern or individual, or individuals will be permitted to distribute, post or otherwise circulate handbills or posters, or any literature of any description on company property without first securing permission from the personnel department." (R. 37).

It also found " - - - - - it is uncontradicted in the record that since July 3, 1941, the plant protection

force has strictly enforced a no-distributing-no-posting rule on the respondent's premises, including the two parking lots. There is no evidence that either outsiders or employees have been permitted to distribute literature of any kind on the lots since that time." (R. 38).

The Board also found:

> "The record - - - - is free from dispute as to the material facts. There is disagreement, however, as to what inferences may properly be drawn from the facts. The Board's attorney contends that they show a discriminatory application of the rule against distribution to Ferguson and Ayers, because of their Union activities; the respondent denies any such discrimination. At the oral argument before the Board, counsel for the Union conceded that there was no basis in the record for a finding of a discriminatory application of the rule by the respondent. - - - - We are of the opinion and find, as did the Trial Examiner, that the record does not support a charge that the rule was discriminatorily enforced against Ferguson and Ayers. It is undisputed that the rule against distribution has been applied to all persons, without exception, seeking to distribute literature on the parking lots where Ferguson and Ayers were apprehended." (R. 40).

We submit that in view of these findings the charge as filed against respondent by the Board as

set out in paragraphs 5, 6, 7, 8, 9, 10 and 11 (R. 10-11), were not supported by the evidence and under the evidence and the law a finding that the charges should be dismissed was demanded.

The Board said there was a broader issue whether a rule prohibiting the distribution of union literature by employees in areas outside of the plant proper, although on company property, is in itself repugnant to the Act, under the circumstances of this case. (R. 40).

After calling attention to the rule requiring an evaluation of conflicting rights, the Board then said:

> "In view of the foregoing well-established principles, THE SOLE QUSTION CONFRONTING US IS WHETHER, UNDER THE CIRCUMSTANCES OF THE INSTANT CASE, TO THE EXTENT THAT THE RULE PROHIBITS DISTRIBUTION OF UNION LITERATURE BY EMPLOYEES ON THE PARKING LOTS, IT CONSTITUTES SUCH A SERIOUS IMPEDIMENT TO THE FREEDOM OF COMMUNICATION WHICH IS ESSENTIAL TO THE EXERCISE OF THE RIGHT TO SELF-ORGANIZATION, THAT THE RIGHT TO SELF-ORGANIZATION MUST BE HELD PARAMOUNT, AND THE RULE GIVE WAY." (Capitalization ours).

It is pointed out that not a single witness was introduced to testify that efforts were made and

thwarted to distribute literature any where on any of the premises other than in the plant and on these two small parking lots, which form a substational and essential part of the facilities for carrying on respondent's business. We point out that there was no hint in the charge as made by the Board against respondent, (Paragraphs 5-6-7-8-9-10-11, R. 10-11), that respondent had violated the Act by the promulgation of the rule but the sole charge was that the rule had been discriminatorily applied against Ferguson and Ayers. Not until all the evidence was in and the case was argued was respondent ever put on notice that the Board would make any such contention as it now advances as a reason for its order. It offered no evidence by any witness to show that the Union's right to self-organization was seriously interfered with by the enforcement of the rule. It simply sought to predicate its order on its own peculiar knowledge with respect to industrial plants and industrial organizations and proof of the location of the plant, the basis for its order.

In substance the proof in the way of evidence in the record is that this plant was located in Tournapuli about three miles northeast of Toccoa, Georgia. (T. R. Vol. 2, page 11).

There are about fifty dwelling houses. It has a United States post office and a gasoline station.

For the sake of accuracy we quote the following questions and answers:

"Q. Now, do you know how much propr-erties the LeTourneau Company owns around this plant there?

A. Something like 6,000 acres.

Q. Does that include the property owned by the Louise Farming Company?

A. Yes.

Q. That is a subsidiary of the LeTourneau Company?

A. Yes. - - - -

Q. Is there any other road between Toccoa and Tournapull?

A. Yes. There is the extension of Tugalo Street which goes out by the airport and ends up at Highway 13 at the plant." (T. R. Vol. 2, page 13).

This is a fair statement of all evidence pertaining to the location of the plant and we submit it falls far short of forming a basis for the Board's statement that this plant is located in the heart of 6,000 acre tract of land. On the contrary, from this evidence, and from the further testimony of L. Wayman Ayers, (T. R. Vol. 2, page 43), that even the superintendent did not know just how far the Company's property extended out from the plant, and the fact that the

town is located within three miles of Toccoa and one of its streets extends into it, it would be perfectly consistent with the evidence to say that the plant was within a stone's throw of the line of the Company property, and that a new subdivision of homes to which the City of Toccoa was authorized by a special Act of the Georgia Legislature, Georgia Laws 1941, page 1774, to extend its water mains and service to private owners, was very near to the plant and that a majority of the employees lived either in Toccoa or in those homes. This Court is bound to take judicial notice of the Act above referred to.

The evidence as to where they lived is:

"Q. Where do most of the employees that you have out there at Tournapull live?

A. Most of them live in Toccoa and surrounding cities.

Q. And within a radius of how far of Tournapull do they live; do you have any idea?

A. The majority of them live within twenty miles.

Q. They live in Toccoa, Cornelia, and various other small towns around here and on farms in that neighborhood, is that correct?

A. That is correct."

This is the evidence in substance on the location of the property and the residences of the employees and we submit it furnishes no basis for the finding by the Board that this rule was in itself under these circumstances, a violation of the Act, in view of the fact that the Board expressly found that it was not discriminatorily applied as to the two employees.

SUMMARY OF ARGUMENT

The charge made against respondent by the Board (R. 10-11) is not broad enough to include a finding by the Board that the respondent had violated the Act by enforcing its rule in view of the finding of the Board that respondent was not guilty of the specific act made in the charge.

Although the Board is vested with exclusive jurisdiction to determine a disputed issue of fact and to draw such inferences as may be legitimately drawn from facts actually proved, it is not within the power of the Board to substitute its knowledge of industrial conditions for substantive evidence, and it cannot enter an order against respondent in this case without having before it substantial evidence to show that the application of the rule in question had materially interferred with the right of self-organization.

The statement in the Board's finding, (R. 42) that "distribution of literature to employees is rendered virtually impossible under these circumstances, and it is an inescapable conclusion that self-organization is

consequently seriously impeded" is not only without support in the record, but is contrary to the positive, uncontradicted testimony, delivered by the witness Haynes, (R. 49) (T. R. Vol. 2, 171 to the effect that no attempt to interfere with the distribution of union literature out on or near the highway immediaely in front of the plant was ever made and that this distribution went on and that it had been handed to him at that point, and the further testimony of George M. Stokes, that the rule had never been applied to any area outside of the plant and parking lots and that the streets and roads leading to the houses at Tournapull were open to anybody that wanted to use them. (R. 49) (Vol. 2, T. R. 236-237).

There was a service station just across the highway from the plant, Vol. 2, T. R. 133-134), which furnished an ideal place for the distribution of such literature as well as the cafeteria and the post office, and the Trial Examiner found as a fact "yet other ways of disseminating union literature are not foreclosed and other means of organizing are not barred by the rule." (R. 28).

LAW APPLICABLE

Section 7 of the Act, 49 Stat. 452, U. S. C. A. Title 29 § 157, give to employees the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. With this we make no issue

but our contention is that we have not in any way violated the terms of this Act, and the Board by its findings with reference to the specific charges contained in record so found.

It must not be overlooked that in February, 1943 the Congress of Industrial Organizations, commenced to organize respondent's employees. An election was held April 8, 1943 resulting in the defeat of the CIO, but it continued its effort to organize these employees. (R. 38). In this situation the effort to establish the union as a bargaining agent was progressing and respondent was under a strict and unavoidable obligation to be absolutely impartial and neutral between the members of the Union and the other employees though the Union had lost the election by a vote of more than two to one. We submit therefore that learned counsel's comment on respondent's claim that if by the Board's order it was compelled to admit the distribution of Union literature in the plant and on the two parking lots, it could not rightfully deny to other members of the public and other employees the right to distribute other literature (P. 30 Mr. Fahy's brief), is not well taken, since under the National Labor Relations Act "employer must maintain a total, complete and honest neutrality." Elastic Stop Nut Corporation v. National Labor Relations Board, 142 F. 2d 371 (19?, " - - - - the National Labor Relations Act imposes upon an employer total and complete impartiality and the utmost of honest neutrality, since even slight suggestion as to employers choice between an outside or inside union may have telling effect and constitute powerful support." National Labor Relations Board

v. Faultless Caster Corporation, 135 F. 2d 559 (3). If such sligh suggestion as to choice between an outside or inside union would as the case cited seems to hold constitutes an unfair labor practice, then such slight suggestion would certainly be likewise objectionable when the choice lay between union members representing less than one-third of the employees and the other employees who were opposing the union by their ballots. If respondent is bound to allow a minority of its employees to distribute union literature on its parking lots, we reiterate it could not rightfully without taking sides deny to the majority of its employees the right to distribute thereon non-union literature and this would bring about the very condition the Act was designed to prevent.

The language of paragraph 2 § 8, 49 Stat. 452, U. S. C. A. Title 29, § 158, not only makes it an unfair labor practice for the employer to dominate or interfere with the formation or administration of any labor organization, but it forbids the employer to "contribute **financial or other support to it.**"

THE RULE WAS NOT INVALID

In Carter Carburetor Corporation v. National Labor Relations Board, 140 F. 2d 714, the rule under consideration was:

> "The solicitation, oral or written, of membership in any union on company property or time is prohibited. A violation of this rule will be considered grounds for dismissal."

In that case the Court held the rule "may not be objectionable as a regulation for the conduct of business."

In Midland Steel Products Co. v. National Labor Relations Board, 113 F. 2d 800, the Court in the course of the opinion said:

> "The right of the employer to make reasonable rules for the safety and efficiency of the work includes his right to make such rules for the entire time that the working force is on the employer's premises. Solicitation, argument, the hurling of epithets, intense discussion before work has commenced or in the noon hour, may reasonably be expected to carry a certain animus over into work hours. If the rule against solicitation is reasonable, the fact that it is applied to soliciting for union membership does not relieve the employee of his obligation of obedience."

See in this connection National Labor Relations Board v. Williamson-Dickie Mfg. Co., 130 F. 2nd 260 (CCA5); National Labor Relations Board v. Denver Tent & Awning Co., 138 F. 2nd 410 (CCA-10); Boeing Airplane Co. v. National Labor Relations Board, 140 F. 2d 423 (CCA-10).

In National Labor Relations Board v. El Paso Electric Co., 133 F. 2d 168 (CCA-5), the company had

a rule of long standing requiring that employees should not display union insignia, and the Court held that the continued indiscriminate enforcement of this pre-existing rule did not deny rights of employees of National Relations Act.

EMPLOYER HAS RIGHT TO SUSPEND EMPLOYEE WITH OR WITHOUT CAUSE SO LONG AS THIS IS NOT DONE FOR UNION ACTIVITIES

"So far as the National Labor Relations Act goes an employer may discharge, or refuse to re-employ for any reason, just or unjust, except discrimination because of union activities and relationships. National Relations Act, 29 U. S. C. A. § 151, et seq".

National Labor Relations Board v. Tex-O-Kan Flour Mills Co., 122 F. 2d 433 (15).

"It is unnecessary for an employer to justify the discharge of an employee so long as it is not for union activities".

National Labor Relations Board v. Union Mfg. Co. 124 F. 2d 332, (2) (CCA-5).

"The National Labor Relations Act of 1935 (49 Stat. at L. 449, Chap. 372, 29 U. S. C. A. § 151) does not interfere with the normal exercise of the right o fan employer to select his employees or to discharge them, so long

as he does not under cover of that right intimidate or coerce his employees with respect to their self-organization and representation."

National Labor Relations Board v. Jones & Laughlin S. Corp., 301 U. S. 1; 81 L. ed 893 (18).

It is clear that an employer may hire and fire at will so long as this is not based upon antagonism to union membership or self-organization. National Labor Relations Board v. Bluebell Globe Co., 120 F. (2d) 974. Since the Board itself found that the rule was not discriminatorily applied against Ferguson and Ayers, it follows that it was without power to make the order entered by it.

BOARD HAD BURDEN OF PROVING VIOLATION OF ACT

In Stonewall Cotton Mills, Inc. v. National Labor Relations Board, 129 F. (2d) 629, at page 632, it was said:

"It must too always be kept in mind that the burden was on the board as accuser, under § 8 (3), in order to establish the facts authorizing itself as judge to find that persons were laid off in violation of it and to require their reinstatement, to show not that they were laid off without sufficient excuse, or even that they were laid off because of antipathy against

them because of their union activity, but that their laying off was, the unfair labor practices denounced by § 8 (3) - - - - to encourage or discourage membership in a union".

The presumption is that an employer has not violated the Act—the burden of proof is not upon the employer, but upon the one who asserts the fact to prove that the discharge was because of union activities. National Labor Relations Board v. Union Mfg. Co., 124 F (2d) 332 (3) (CCA-5).

"The Act does not interfere with the normal exercise of a right of the employer to select its employees or to discharge them. The employer may not, under cover of that right intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the board is not entitled to make its authority a pretext for interference with a right of discharge when that right is exercised for other reasons than such intimidation and coercion".

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1, 81 L. ed 893.

"The company does not have to prove non-discrimination because of union activities. The Board **must** (underscoring ours) prove discrimination because thereof. This burden of the Board to prove discrimination

and to prove that discrimination was employed in the hiring or firing of a man because of his union activities does not shift from the Board".

Interlake Iron Corp. v. National Labor Relations Board, 131 F. (2d) 129, 132 (8) (CCA-7).

The findings of the National Labor Relations Board, to be conclusive, must be supported by substantial evidence—this means more than a mere scintilla, and is such evidence as a reasonable mind might accept as adequate to support a conclusion. International Brotherhood of Electrical Workers v. National Labor Relations Board, 305 U. S. 197; 83 L. ed. 126.

In conclusion we submit there was not even a scintilla of evidence offered to show that the suspension of Ferguson and Ayers discouraged Union organization or activity. There was no substantial basis for finding that the application of respondents no-posting-no-distribution rule was done to encourage or discourage membership in a union or that it interfered with the employees right to self-organization to any material extent. On the other hand, the evidence of Haynes (R. 49) was uncontradicted that there was no interference with the distribution of Union literature near the highway immediately in front of the plant, and that this absolutely went on. That he himself had had it handed to him in a bus and a car. See also testimony of George M. Stokes (R. 49 Tr. Vol. 2

p. 236-237). No one testified in behalf of the Board or the Union that the suspension of Ferguson and Ayers discouraged or interfered with the Union, or that it materially interrupted the distribution of literature among the employees. The Board could not substitute its expert judgment on matters pertaining to industry for substantive evidence. Its order was illegal, without any support of evidence in the record, the judgment of the Circuit Court of Appeals was correct and the only legal judgment that could have been rendered, and should be affirmed.

Respectfully submitted,

Toccoa, Ga. C. M. McClure

Toccoa, Ga. Clifton W. Brannon

Gainesville, Ga. A. C. Wheeler

Wheeler, Robinson & Thurmond

Attorneys for Respondent.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. Sec. 151, et seq.) are as follows:

Sec 1.

— — — — —

It is hereby declared to be the policy of th United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedue of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

— — — — —

Sec. 7. Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing , to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer —

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial **or other support to it**; - - - - - (underscoring ours).

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; - - - -

— — — — —

Sec. 10.

— — — — —

(c) - - - If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findigs of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affimative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this act. - - -.

— — — — —

(e) - - - The findings of the Board as to the facts, if supported by evidence, shall be conclusive. - - - - -.